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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 650

PHIL WHITUS and LEON DAVIS,

Petitioners,

v.

THE STATE OF GEORGIA,

Respondent.

PETITIONERS' BRIEF

CHARLES MORGAN, JR.
Counsel for Petitioners
5 Forsyth Street, NW
Atlanta, Georgia 30303

Of Counsel:

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Table of Cases

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Petitioners hereby adopt the Table of Cases, Constitutional Provisions Cited, Statutes Cited, and Other Authorities Cited in their brief in No. 253 herein, and add thereto the following additional citations:

Reece v. *Georgia*, 350 U.S. 85 (1955) 7, 8

Mills v. *Alabama*, 384 U.S. 214 (1966) 8

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Opinion Below

The Opinion of the Supreme Court of the State of Georgia in *Whitus* v. *The State* is reported at 222 Ga. 103 (1966). The Opinion of the Supreme Court of the State of Georgia in *Davis* v. *The State* is reported at 222 Ga. 114 (1966).

Jurisdiction

The judgment of the Supreme Court of Georgia in *Whitus* v. *The State* was entered on April 12, 1966. Rehearing was denied on May 5, 1966. The judgment of the Supreme Court of Georgia in *Davis* v. *The State* was entered on April 19, 1966. Rehearing was denied on May 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), petitioners having asserted below and asserting here the deprivation of their rights, privileges and immunities

claimed under the Constitution of the United States, and the validity of State statutes being drawn in question on the ground of their being repugnant to the Constitution of the United States.

Questions Presented

1) Whether a Negro criminal defendant can be indicted conformably with the Constitution of the United States when State law requires the jury commissioners of a county to select the names of prospective traverse jurors from the county tax receiver's tax digest and to maintain his tax digest on a racially segregated basis; and as subsidiary questions thereto, whether the mechanics of selection of traverse jurors required by state law make discrimination probable, and whether a traverse jury so selected would be unconstitutionally composed; and

2) Whether Sections 59-106 and 92-6307 of the Code of Georgia, when construed together, are repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and

3) Whether a Negro criminal defendant can be constitutionally tried by a traverse jury selected from a jury list which was made up, with reference to a pre-existing jury list admitted to have been unconstitutionally composed of names selected pursuant to state law from a tax digest maintained pursuant to state law on a racially segregated basis; and

4) Whether from the evidence adduced at the hearing in the trial court below there was shown a systematic exclusion of Negroes from the traverse jury which tried the peti-

tioners, Negro criminal defendants, they being thereby deprived of rights secured to them by the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

5) Whether Section 59-106 of the Code of Georgia, which requires that those persons selected for jury service be "upright and intelligent" establishes on its face and in its application a nonascertainable standard for jury selection and is unconstitutionally vague and therefore void, and, as a subsidiary question thereto, whether Sections 59-106 and 92-6307 of the Code when construed together are repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States; and

6) Whether the judgment of the Supreme Court of Georgia should be reversed and rendered, the petitioners being discharged due to the failure or refusal of the State of Georgia to comply with the order of the United States Court of Appeals for the Fifth Circuit, providing Georgia a period of eight months within which to reindict and retry petitioners by constitutionally composed grand and traverse juries.

Statutes Involved

The statutes involved are the same as those set forth in Petitioners' Brief in No. 253 herein.

Statement of the Case

Petitioners hereby adopt the statement of the case in Petitioners' Brief in No. 253 herein, and add thereto the following:

1. Proceedings Below

The petitioners were tried at the October 1965 term of Court, an array of jurors differing from that in April being put upon them. At trial they were convicted and again sentenced to death by electrocution.

Prior to their trials, petitioner Phil Whitus and petitioner Leon Davis both filed challenges to the array of jurors (R. 7, 44), on the ground that the said petit jury was, in fact, and by state law had to be illegally and unconstitutionally composed and drawn and was in derogation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and that the trial before the said petit jury would deprive them of due process of law and equal protection of law guaranteed them by Article III, Section 2, and the Fifth, Sixth and Seventh Amendments of the Constitution of the United States.

The Judge of the Superior Court of Mitchell County heard the evidence and arguments on the challenge to the array of traverse jurors on October 16, 1965 (R. 16-34, 59-71). The Judge of the Superior Court entered an order denying the challenges, and petitioners excepted to that judgment. That judgment was a final judgment, from which appeal lay to the Supreme Court of Georgia.

Petitioners timely filed their Bills of Exceptions with the Supreme Court of Georgia (R. 35, 72), preserving their constitutional grounds in the following language:

> 2. The court erred in dismissing the challenge to the array of petit jurors since it affirmatively appeared that 49% of the population of Mitchell County were Negroes and only 7% of the petit jury were of the Negro race.

Petitioners timely filed their motions for rehearing in the Supreme Court of Georgia (R. 37-41, 73-75), and these motions were denied on May 5, 1966 (R. 41, 76).

Denial of petitioners' motions for rehearing exhausted their State remedies.

2. Statement of the Facts

The evidence showed that ninety people had been called for service on the traverse jury, of whom at least seven (or eight per cent) were Negroes (R. 17, 60). It further showed that the petit jury list was prepared with reference to the previous petit jury list of the county (R. 21, 28, 63, 69), admitted to have been a list from which Negroes had been systematically excluded in *Whitus* v. *Balkcom*, 333 F. 2d 496 (1964), at page 500, and, as required by law (Ga. Code §59-106), from the tax digest of the county, which was maintained as required by law (Ga. Code §92-6307) on a racially segregated basis, and in accordance with custom on paper of different colors for the two races (R. 19-20, 61-62). There were no other sources for the names selected. As a rule, the commission accepted the determination of the commissioner in whose community the prospec-

tive juror resided as to his qualifications (R. 21-24, 28, 30, 63, 65, 67, 70).

The State asked each jury commissioner whether he personally purposely included or excluded any person for prospective petit jury duty service because of race, color, creed or national origin, and each one answered that he did not (R. 22, 28-29, 64, 69). It further appeared that all six county jury commissioners were white (R. 20-21, 62-63), and that the commissioners did use the tax digests for jury selection maintained upon a racially segregated basis as required by Georgia law (R. 19-22, 24, 28-29, 61-63, 66-67, 69-70). The commissioners stated that only those tax payers whom they knew personally were selected for the jury list, and that only those tax payers who were "upright" and "intelligent" were so selected (R. 21-22, 24, 29-30, 63-67, 69-70). No intelligence tests were given any tax payers, nor were their criminal records researched (R. 21, 29-30, 63, 70). The commissioners testified that there were more white tax payers than Negro and that there was a total of 600 names on the jury list (R. 23, 29, 65-66, 69). One commissioner guessed that 25-30% of the jury list was Negro, but stated this to be a "wild guess" adding that he had no certain knowledge of the exact percentages (R. 25, 67).

The portion of the Federal decennial census respecting the racial composition of Mitchell County (*1960 Census of Population,* Vol. 1, *Characteristics of the Population,* Part 12; Table 27, p. 12-123, previously submitted to the Court) was introduced by petitioners (R. 31-34). As theretofore held by the Court of Appeals of Georgia, *Whitus* v. *The State,* 112 Ga. App. 328, 145 S.E. 2d 83 (1965) (*Whitus and Davis* v. *State of Georgia,* No. 1270 Misc.), the trial

court, in effect, took judicial notice of this census and included it in its consideration of the case, as required by prior state decisions. See *Tift* v. *Bush,* 209 Ga. 769, 771, 75 S.E. 2d 805 (1953). This census shows, *inter alia,* that 10,206 people over the age of twenty-one years were included in the Mitchell County population. Of these, 4,706 were male, 2,702 being white and 2,004 (or 42 per cent of the adult male population) being Negro.

Argument

Petitioners hereby adopt the argument contained in Petitioners' Brief in No. 253 herein and allege that the same argument applies with respect to the selection of petit jurors.

The judgment in No. 253 herein was a final judgment. The Superior Court of Mitchell County denied petitioners' challenges to the array of grand jurors on April 19, 1965. This denial was a final judgment under Georgia law, Code Ann. Sec. 6-701. To preserve their remedies, petitioners appealed within thirty days from the denial to the Supreme Court of the State of Georgia. This appeal was transferred to the Court of Appeals of Georgia for hearing. There, the judgment was affirmed on September 8, 1965. The Supreme Court of the State of Georgia denied certiorari on November 9, 1965. Thereafter, petitioners petitioned this honorable Court.

Respondent contends that the order of the Court of Appeals of Georgia denying the challenges to the array of grand jurors is not a final judgment subject to review by this Court under 28 U.S.C. Sec. 1257 (3). Petitioners are of the opinion that *Reece* v. *Georgia,* 350 U.S. 85 (1955)

is entirely dispositive of respondent's contention. There, this Court considered the question of whether "a semi-illiterate Negro of low mentality," *Reece, supra,* p. 89, and without benefit of counsel, could realistically be said to have had an opportunity to raise objection to the composition of his Georgia grand jury prior to indictment. In determining that petitioner had not had such an opportunity, the Court brushed aside the objection that it had no jurisdiction over the grand jury issue, stating: "We have jurisdiction to consider all of the substantial Federal questions determined in the earlier stages of the litigation, ..." *Reece, supra,* p. 87. Cf. *Mills* v. *Alabama,* 384 U.S. 214 (1966).

Conclusion

The judgment of the Supreme Court of Georgia should be reversed and rendered with instructions that the petitioners be freed.

Respectfully submitted,

CHARLES MORGAN, JR.
Counsel for Petitioners
5 Forsyth Street, NW
Atlanta, Georgia 30303

Of Counsel:

P. WALTER JONES
B. CLARENCE MAYFIELD
MORRIS BROWN
LAUGHLIN MCDONALD
MELVIN L. WULF